SPECTRAL DATA SERVICES, INC.
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DECLARATION OF DR. GARY L. TURNER

I, Gary L. Turner, declare and state that:

1. I received a Bachelor of Science degree in Chemistry from the University of Illinois, Urbana, Illinois in 1978 and a Doctorate degree in Physical Chemistry at the University of Arkansas, Fayetteville, Arkansas in 1982.

2. From July 1982 to June 1988, I was a research associate for Dr. E. Oldfield, at the University of Illinois, Urbana, Illinois.

3. From August 1985 to the present, I have been employed by Spectral Data Services, Inc., where my duties include obtaining Nuclear-Magnetic-Resonance data on sample materials.

4. From April 1986 to August 1990 I was also employed as the Vice-President of Probe Systems, Inc., where I was responsible for designing Nuclear-Magnetic-Resonance (NMR) equipment.

5. I have published 38 peer-reviewed scientific papers, a list of which is shown in the Attachment.

6. Over the last year, I obtained ^{1}H MAS NMR data on about 300 blind samples of compounds provided by BlackLight Power, Inc.

7. A 270 MHz NMR Spectrometer, operating at a Larmor frequency of 270.6196 MHZ was used. The spectrometer was equipped with a Tecmag operating system and Henry Radio amplifiers for pulse generation. The probe was a 7 mm Doty Scientific Standard Probe. The data was collected with a pulse angle of about 15°, with a two second delay between pulses. The samples were spun at two speeds, usually at 4.5 and 3.5 KHz, to identify the spinning sidebands. Typically, 200 transients were collected for each spectrum. The data was processed using NUTS (Acorn NMR, Inc.) software.

8. Some of the samples showed signals in regions that are not typical. Most ^{1}H MAS NMR signals are observed from about 10 to 0 ppm, where ppm represents the shift from the chemical shift standard, tetramethylsilane. Signals for BLP samples were observed at -4 to -5 ppm. Since 1978, I have been primarily conducting NMR scans and I have never observed signals in the region of -4 to -5 ppm before.

9. For sample 080304BLP1, in the ^1H MAS NMR spectrum two unusual signals were observed, at -4.1 and -4.5 ppm. The only compounds known to have chemical shifts in this region are transition metal hydrides, in particular Mg_2NiH_4. Elemental analysis (Galbraith Laboratories, Inc., Knowville, TN) showed that Mg and Ni are not detected in this sample, and that K was the main metal present. Earlier NMR data has shown that the hydride of K appears at about 1.0 ppm. Therefore, these results suggest that the signals at -4.1 and -4.5 ppm represent a novel species, and do not correspond to any known metal hydride.

10. I declare further that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

By _____
Dr. Gary L. Turner

Date: 8/24/011

DECLARATION OF DR. RANDELL L. MILLS

I, Randell L. Mills, declare and state as follows:

1. I am the founder and CEO of BlackLight Power, Inc., located at 493 Old Trenton Road, Cranbury, New Jersey 08512.

2. I majored in chemistry and received my bachelor of arts degree, *summa cum laude* and Phi Beta Kappa, from Franklin & Marshall College in 1982. I received a medical degree from Harvard Medical School in 1986. While attending Harvard Medical School, I concurrently spent a year taking courses in advanced electrical engineering at the Massachusetts Institute of Technology. I have also had significant academic training in biology, chemistry, mathematics and physics.

3 I began my research in the field of energy technology over ten years ago. I have authored, co-authored or collaborated on numerous publications, reports and presentations at scientific meetings in the field of energy technology and novel hydrogen chemistry, as shown in the attachment hereto.

4 I am fully qualified to conduct the research that led to the discovery and development of BlackLight's lower-energy hydrogen technology.

5. I personally conducted and/or supervised the experimental data disclosed in the articles submitted to the U.S. Patent and Trademark Office ("PTO"), which are described in the attached list. The coauthors, if any, assisted me in preparing the data.

I declare further that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

By _____
Dr. Randell L. Mills

Date: 9 August 2004

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48. P. Ray, R. Mills, "Extreme Ultraviolet Spectroscopy of Helium-Hydrogen Plasma" (Physical Chemistry Session), June 11, 2003, 36th Middle Atlantic Regional Meeting of American Chemical Society, (June 8–11, 2003), Princeton University, Princeton, NJ.
47. R. Mills, "Novel Catalytic Reaction Of Hydrogen as a Potential New Energy Source" (Catalysis Session), June 10, 2003, 36th Middle Atlantic Regional Meeting of American Chemical Society, (June 8–11, 2003), Princeton University, Princeton, NJ.
46. J. He, R. Mills, "TOF-SIMS and XPS Studies of Highly Stable Silicon Hydride Films" (Inorganic/Solid State Session), June 9, 2003, 36th Middle Atlantic Regional Meeting of American Chemical Society, (June 8–11, 2003), Princeton University, Princeton, NJ.
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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC. Plaintiff, v. Q. TODD DICKINSON, Under Secretary and Director of Patents Defendant.	)	No. 00 0422 EGS

DECLARATION OF ESTHER M. KEPPLINGER

I, Esther M. Kepplinger, declare and state:

1. I am presently employed by the United States Patent and Trademark Office ("USPTO"), and at all times relevant to the matters contained in this declaration, I served as the Director for Technology Center 1700. If called as a witness, I would testify as follows:

2. On Thursday, February 24, 2000, I received a call from Jeffrey Melcher, the attorney for the applicant on application 09/009,294 ("the '294 application"). Mr. Melcher indicated that he had received a Notice dated February 17, 2000 stating that the '294 application had been withdrawn from issue. I indicated to Mr. Melcher that I was the person that was responsible for the withdrawal.

3. Four days later, Monday, February 28, 2000, Mr. Melcher came to my office. I

explained to Mr. Melcher that I was extremely concerned about the application because it was based on the concept of an electron going to a lower orbital in a fashion that is contrary to the known laws of physics and chemistry. I also may have said that the questionable sciences alleged in patent number 6,024,035 and the '294 application were similar to other questionable sciences such as "cold fusion" and "perpetual motion", but I did not tell Mr. Melcher that my concerns relating to the '294 application were based solely on the concepts of "cold fusion" and/or "perpetual motion." My main concern was the proposition that the applicant was claiming the electron going to a lower orbital in a fashion that I knew was contrary to the known laws of physics and chemistry.

4. Mr. Melcher then questioned me as to whether Commissioner Q. Todd Dickinson was involved in the decision to withdraw the '294 application. I specifically stated to Mr. Melcher that Commissioner Dickinson had nothing to do with the initial decision to withdraw the application. I told him that I alone made the decision to withdraw the application based on patentability concerns. At no time did I tell Mr. Melcher that Commissioner Dickinson directed me or anyone else to withdraw the application from issue.

5. I did not discuss my decision to withdraw the application with any person outside the USPTO. No one directed me to make the decision to withdraw the '294 application.

6. Contrary to Mr. Melcher's assertion, my decision was not based in whole or in part on any "perceived 'heat'" the USPTO had received from an undisclosed, outside source.

7. The decision to withdraw the application was based solely on the patentability standards contained in Title 35 of the United States Code.

8. Mr. Melcher and I discussed four other applications by the same applicant that had gone to issue. I told Mr. Melcher that I was "pulling" these applications back from their locations so that I could take a look at them. I did not tell Mr. Melcher that I was going to withdraw these cases from issue. I told him that, unlike the sense of urgency regarding the '294 application, I still

had time to obtain the other four application files for review without withdrawing them from issue. I explained that the reason I hadn't done the same with the '294 application is that it was much closer to its issue date than the other four applications.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

4/14/00
Date

Esther M. Kepplinger
Esther M. Kepplinger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.	)	C.A. NO. 00-422(EGS)
	)	
VS.	)	WASHINGTON, D.C.
	)	MAY 22, 2000
Q. TODD DICKINSON	)	10:00 A.M.

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE EMMET G. SULLIVAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL H. SELTER, ESQ.
JEFFREY A. SIMENAUER, ESQ.
JEFFREY S. MELCHER, ESQ.

FOR THE DEFENDANT: FRED E. HAYNES, ESQ.
KEVIN BAER, ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR
U. S. COURTHOUSE, RM. 6822
WASHINGTON, D.C. 20001
(202) 371-0545

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

SOMETHING FOCUSED HER ATTENTION ON THE 935 PATENT AND THE TIMING OF THE 294 PATENT IS JUST, IT'S NOT JUST COINCIDENTAL. IT WAS ABOUT TO ISSUE.

MR. BAER: WELL, IT WAS ABOUT TO ISSUE, YOUR HONOR, BUT WHAT HAPPENED IS, I DON'T KNOW, TO ANSWER YOUR QUESTION DIRECTLY, I DO NOT KNOW HOW THE DIRECTOR BECAME AWARE THAT WE ISSUED A --

THE COURT: DOESN'T THE COURT NEED TO KNOW THAT IN AN EFFORT TO DETERMINE WHETHER THE ACTIONS OF THE GOVERNMENT ARE INDEED ARBITRARY AND CAPRICIOUS?

MR. BAER: I DON'T BELIEVE SO, YOUR HONOR, BECAUSE THE ISSUE IS, IS THERE A SCIENTIFIC BASIS, A REASONABLE SCIENTIFIC BASIS, TO WITHDRAW IT? AND IS THAT ARBITRARY AND CAPRICIOUS? PLAINTIFF DOESN'T EVEN CHALLENGE THE REASONABLENESS. NOW, THEY HAVE SOME PROCEDURAL ISSUES THEY ARGUE WITH, BUT THE ACTUAL ISSUES OF THE SCIENTIFIC CONCERNS, THEY DO NOT CHALLENGE. THEY ADMIT THAT THIS IS NOVEL SCIENCE, THIS IS UNKNOWN. THEY SAY IT WORKS. THEY SAY IT'S DIFFERENT, THAT THEY HAVE TAKEN QUANTUM MECHANICS TO A NEW LEVEL.

THE COURT: SO NO ONE, THE PLAINTIFFS ARE NOT ASKING THE COURT TO FOCUS ON THE REASONS LEADING UP TO OR THE FACTS OR CIRCUMSTANCES LEADING UP TO THE DIRECTOR'S CONSIDERATION OF THE 935 PATENT?

MR. BAER: I DON'T BELIEVE SO. THEY WITHDREW THAT.

THE COURT: NO ONE IS CASTING ANY SINISTER ALLEGATIONS

(PAUSE) --

MR. SELTER: WE'RE SAYING FOR PURPOSES OF THE MOTION FOR SUMMARY JUDGMENT, SINCE THEY DISPUTE IT IN THEIR AFFIDAVIT, WE ARE NOT RAISING THAT AS A POINT, BUT WE DO BELIEVE THAT IT OCCURRED. AND SIGNIFICANTLY, I'VE YET TO HEAR FROM MR. BAER. I MEAN, IT'S A FACT IT'S DISPUTED, BECAUSE WE WANT A DECISION ON --

THE COURT: YOU CAN'T HAVE IT BOTH WAYS, COUNSEL. YOU'RE NOT RAISING IT AS A POINT. CORRECT?

MR. SELTER: WE'RE NOT RAISING IT AS A POINT.

THE COURT: ALL RIGHT.

MR. SELTER: BUT WE WILL NEED A DECISION TO BE RESOLVED FOR PURPOSES OF THE SUMMARY JUDGMENT.

THE COURT: I JUST WANT THE RECORD CLEAR ON THAT.

ALL RIGHT, THANK YOU.

ALL RIGHT.

MR. BAER: YOUR HONOR, EVEN --

THE COURT: IT'S NOT A POINT.

MR. BAER: OKAY. I WOULD EVEN SAY, YOUR HONOR, YOU COULD IMAGINE IN YOUR HEAD ANY SCENARIO OF HOW WE LEARNED ABOUT IT. A BLIMP FLYING OVER US. IT DOESN'T MATTER, BECAUSE WHAT MATTERS, YOUR HONOR, IS THE DECISION ITSELF. IS THERE A REASONABLE, NON-ARBITRARY REASON BASED ON THE SCIENCE, BASED ON THE PATENTABILITY, TO WITHDRAW THIS APPLICATION FROM ISSUE? THE ANSWER IS YES. PLAINTIFF DOES NOT CHALLENGE THAT.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.	)	
Plaintiff,	)	Civil Action No. 00 CV 0422 (EGS)
v.	)	
Q. TODD DICKINSON Director of the United States Patent and Trademark Office	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE SCHDEDULING ORDER

Defendant, Q. Todd Dickinson, Director of the United States Patent and Trademark Office ("Director"), respectfully opposes plaintiff's motion for an open-ended stay because no further stay is warranted and any additional stay will serve as an unjustified restraint against lawful government activity. Although plaintiff fails to ask properly for a preliminary injunction, plaintiff is seeking, in effect, a preliminary injunction against the United States. The motion should be denied for three independent reasons. First, plaintiff's failure to seek a preliminary injunction under Federal Rule of Civil Procedure 65 should summarily preclude the relief requested. Second, assuming that this Court treats plaintiff's motion to amend the scheduling order as a proper motion for a preliminary injunction, then the motion should be denied because plaintiff has failed to articulate any basis for a preliminary injunction. Last, if this Court reviews the merits of a theoretical request for a preliminary injunction, then a preliminary injunction should be denied

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United States District Court,
District of Columbia.

BLACKLIGHT POWER, INC., Plaintiff,
v.
Q. Todd DICKINSON, Commissioner of Patents and Trademarks, Defendant.

Civil Action No. 00-422(EGS).

Aug. 15, 2000.

Patent applicant challenged Patent Office's decision to withdraw application after payment of issue fee. On cross-motions for summary judgment, the District Court, Sullivan, J., held that: (1) Patent Office had statutory authority to withdraw issued patent after payment of issue fee, and (2) withdrawal was not abuse of discretion.

Plaintiff's motion denied; defendant's motion granted.

West Headnotes

[1] Patents ⇐114.17
291k114.17

Patent Office's interpretation of patent issuance statute is due *Chevron* deference. 35 U.S.C.A. § 151.

[2] Patents ⇐107
291k107

Patent Office had authority, under its statutory mandate to issue only patent to which applicant is entitled, to withdraw application even after applicant has paid issue fee. 35 U.S.C.A. § 151.

[3] Patents ⇐107
291k107

Patent Office regulation authorizing withdrawal of issued patent upon determination of unpatentability was reasonable application of statutory mandate to issue only patent to which applicant was entitled. 35 U.S.C.A. § 151; 37 C.F.R. § 1.313(b).

[4] Patents ⇐112.2
291k112.2

Patent Office decision refusing to rescind notice of patent withdrawal, rather than notice of withdrawal itself, was final agency action, for purposes of judicial review.

[5] Patents ⇐107
291k107

Patent Office decision to withdraw patent application after payment of issue fee, upon determination that it raised substantial question of patentability, was not arbitrary or capricious, even though regulation allowed withdrawal only upon determination of unpatentability; Patent Office was entitled to withdraw application and return it to examiner for determination of patentability. 5 U.S.C.A. § 706(2); 37 C.F.R. § 1.313(b)(3).

Patents ⇐328(2)
291k328(2)

6,024,935. Cited.

*45 Michael H. Selter, Farkas & Manelli, P.L.L.C., Jeffrey Allan Simenauer, Washington, DC, for Plaintiff.

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MEMORANDUM OPINION AND ORDER

SULLIVAN, District Judge.

I. Introduction

Plaintiff Blacklight Power, Inc., alleges that defendant Q. Todd Dickinson, Commissioner of the Patent and Trademark Office (PTO), violated the Administrative Procedure Act (APA), 5 U.S.C. § 706 *et seq.*, when the PTO withdrew one and threatened to withdraw four others of plaintiff's patents from issue after plaintiff had received a "Notice of Allowance and Issue Fee Due" and payed the issue fee. The issues presented are whether the defendant had the authority to withdraw plaintiff's patent after plaintiff had paid the issue fee, and, if defendant did have the authority, whether that withdrawal was arbitrary and capricious. Plaintiff

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reverse the PTO's withdrawal decision. In a decision issued March 22, 2000 (March 22 Decision), defendant denied plaintiff's petition, refused to rescind the February 17 Notice, and disallowed plaintiff's patent. *See* Pl.'s Mot. for Summ. J., Ex. 8. The March 22 Decision indicated that the reason behind the withdrawal of the '294 application was its similarity to the '935 patent, both of which claimed to attain energy levels below the ground state according to a "novel atomic model." *See* Pl.'s Mot. for Summ. J., Ex. 8 at 2. Both claim that the electron of a hydrogen atom can attain an energy level and orbit below the 'ground state' corresponding to a fractional quantum number. According to defendant, this assertion alarmed the Director, who had *47 examined the '935 patent, and who had learned of the '292 application, because it "did not conform to the known laws of physics and chemistry." *Id.* The March 22 Decision states that the Director "was immediately aware that any pending application embodying such a concept raise [d] a substantial question of patentability of one or more claims which would require reopening prosecution." *Id.*

III. Procedure

Plaintiff filed this lawsuit on March 1, 2000. Plaintiff's complaint consists of two counts. Count I seeks preliminary and permanent injunctive relief directing defendant to issue the five contested patents-in-application as patents. Count II seeks a declaratory judgment that defendant's withdrawal of the patent applications was arbitrary and capricious and contrary to the PTO's own regulations and to the applicable patent issue statute. Plaintiff filed its motion for a temporary restraining order and preliminary injunction on March 2, 2000. At their March 3, 2000 hearing, the parties agreed that plaintiff would withdraw its motion without prejudice, and defendant would not take any Office Action with respect to the patents-in-application. On March 8, 2000, the Court issued an order memorializing that agreement, and setting a briefing schedule. Defendant filed the administrative record on March 22, 2000. The parties filed their cross motions for summary judgment on April 4, 2000. They filed their responses in opposition on April 18, 2000. Plaintiff filed its reply in support on May 1, 2000, and defendant filed its reply in support on May 5, 2000. The Court held a motions hearing on the cross motions for summary judgment on May 22, 2000.

IV. Discussion

The Court must examine several questions to resolve the pending cross motions. First, the Court must determine whether defendant has the authority to withdraw plaintiff's patent after plaintiff has paid the issue fee. If the Court determines that the PTO did possess the requisite authority, then the Court must conclude which PTO issuance, the February 17 Notice or the March 22, 2000 Decision, constitutes final, reviewable agency action. As the last step, the Court must determine whether that final agency action was arbitrary and capricious in contravention of the APA.

A. *Whether the PTO Has the Authority To Withdraw Plaintiff's Patent After Payment of the Issue Fee*

Plaintiff argues that the PTO does not have the authority to withdraw plaintiff's patent after payment of the issue fee for three reasons: 1) because doing so violates the plain language of the statute, 2) because the PTO regulation on which defendant bases its authority violates the plain language of the statute, and 3) because case law directs defendant to issue the patent upon payment of the fee.

1. *Patent Issuance Statute:* 35 U.S.C. § 151

The parties interpret 35 U.S.C. § 151, the statute governing the issuance of patents, to support their respective positions by focusing on different sections of the statute. 35 U.S.C. § 151 provides in relevant part:

> **If it appears that applicant is entitled to a patent under the law,** a written notice of allowance of the application shall be given or mailed to the applicant. The notice shall specify a sum, constituting the issue fee or a portion thereof, which shall be paid within three months thereafter. *Upon payment of this sum the patent shall issue,* but if payment is not timely made, the application shall be regarded as abandoned. 35 U.S.C. § 151 (emphases added).

Plaintiff focuses on the italicized language directing that "[u]pon payment of [the issue fee] the patent shall issue." It is well-established that "shall" is the "language of *48 command." *Boyden v. Commissioner of Patents,* 441 F.2d 1041, 1042 n. 3

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application;
(3) *unpatentability of one or more claims* ...
37 C.F.R. § 1.313(b) (emphasis added).

The gravamen of plaintiff's regulatory argument is that the issue before the Court is not whether the PTO is obligated to determine a claim's patentability, but when it must make this determination. Plaintiff argues that § 151 and its legislative history indicate that the PTO must make this determination before issuance of the notice of allowance and payment of the issue fee. [FN4]

FN4. Plaintiff compares § 151 to 35 U.S.C. § 303, the patent reexamination statute, which allows reexamination of a patent only if there is a "substantial new question of patentability." The Federal Circuit, dismissing the PTO's reliance on its Manual of Patent Examining Procedure (MPEP), held that this statute does not allow reexamination of patent claims on ground considered before the patent was issued, even though reexamination might reveal that the requirements for patentability had not been met. *In re Recreative Technologies Corp.*, 83 F.3d 1394, 1397 (Fed.Cir.1996).

Defendant counters that the PTO has long had the discretion to withdraw a patent even after payment of the issue fee on unpatentability grounds. Subsection (3) was added to 37 C.F.R. § 1.313(b) in 1982. However, even before the addition of the "unpatentability" language, the PTO had the discretion to withdraw applications from issue on the basis of "mistake on the part of the Office" or subsection (1). The mistake ground was consistently held to envelop subsequently discovered reasons undermining an application's patentability. *See, e.g., Hull v. Commissioner of Patents*, 9 D.C. (2 MacArth.) 90 (1875)(denying writ of mandamus requesting issue of withdrawn patent). Indeed, defendant argues that the Director has not only the discretion but the duty to withdraw a patent from issue if there is a question about its patentability. *See In re Alappat*, 33 F.3d 1526, 1535 (Fed.Cir.1994)(en banc)(plurality opinion) (holding that the "Commissioner has an obligation to refuse to grant a patent if he believes that doing so would be contrary to law").

As for the standard of review of the PTO's adoption of 37 C.F.R. § 1.313(b), its own regulation, plaintiff offers two arguments to support its contention that the Court's review should be more searching and less deferential. First, plaintiff argues that 37 C.F.R. § 1.313(b) does not have the force and effect of law, because the PTO does not have substantive rulemaking powers outside of its own regulations. [FN5] and so the regulations are not entitled to the Court's deference.

FN5. 35 U.S.C. § 6 empowers the Commission to "establish regulations, not inconsistent with law, for the conduct of proceedings in the Office." Accordingly, the Commissioner may issue only those regulations concerning the conduct of PTO proceedings.

Alternatively, plaintiff avers that, even if the Court were persuaded that deference is owed § 1.313(b) because it concerns patent proceedings, the regulation still cannot be "inconsistent with law," and under this standard, § 1.313(b) is invalid. Even where an agency's interpretation is entitled to deference, "the courts are the *50 final authority on the issue of statutory construction. They must reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981). Here, plaintiff claims, Congress has explicitly spoken to the salient issue, and so the court "must give effect to the unambiguously expressed intent of Congress." *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 1299, 146 L.Ed.2d 121 (2000).

Defendant maintains that *Chevron* deference is appropriate here as well, on several grounds. First, as noted above, defendant argues that this regulation is due great deference because it was propounded pursuant to a statute that the PTO Director is charged with administering. *See Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). Second, defendant argues that the Court must "accord[ ] considerable weight to the prior long-standing interpretation, if reasonable, of the agency charged with administering a regulatory scheme," *see Craft Machine Works, Inc. v. United States*, 926 F.2d 1110, 1114 (Fed.Cir.1991), and that 35 U.S.C. § 151 and 37 C.F.R. § 1.313(b) have co-existed without incident under that "prior long-standing interpretation." [FN6]

FN6. The PTO has interpreted the "shall issue" language as allowing the withdrawal of a patent

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might well be enhanced by strict and merciful cut-off of Patent and Trademark Office consideration of an individual patent application once notice and payment have been effected, particularly one that has been so prominent and protracted as Sampson's." *Id.*

Unlike the *Brenner* and *Gypsum* courts, the *Sampson* court considered the issue presented in the present case: whether defendant has the authority to refuse to issue a patent once the issue fee has been paid. Accordingly, defendant addresses it by citing a more recent case from this court, *Harley v. Lehman*, 981 F.Supp. 9 (D.D.C.1997), which also considered the issue in the present case, but which discounts the *Sampson* case because of a subsequent change in the PTO's implementing regulations.

Harley is factually and procedurally identical to the present case. In *Harley*, plaintiff's application was allowed, plaintiff paid the issue fee, and a patent number and issue date were set. Just five days before the issue date, pursuant to 37 C.F.R. § 1.313(b)(3), the PTO withdrew the application, because a PTO director became concerned about the possible unpatentability of the application's claims. The applicant sued in district court, asserting, as Blacklight does, that the Commissioner lacked the statutory authority to withdraw the patent once the issue fee had been paid. The *Harley* court held that the PTO regulation allowing withdrawal of a patent from issue based on unpatentability was a reasonable interpretation of 35 U.S.C. § 151. The court also noted the historic coexistence of the ostensibly vying statutes as further proof that the PTO's interpretation was reasonable.

*52 The *Harley* court specifically discounted the *Sampson* case. Like Blacklight, the *Harley* plaintiff relied on *Sampson*. The *Harley* court held, however, that "[p]laintiff's reliance on *Sampson v. Dann* ... is misplaced ... [because t]he regulation at issue in this case had not yet been enacted when *Sampson* was decided." [FN8] *Harley*, 981 F.Supp. at 12 n. 3. The *Sampson* court considered the interplay between 35 U.S.C. § 151 and 37 C.F.R. § 1.313(b) before the unpatentability ground, or subsection (3), had been added to the latter provision. Accordingly, the provision allowed the PTO to withdraw the patent after payment of the issue fee only in cases of (1) a mistake on the part of the Office, and (2) a violation of § 1.56 [fraud] or illegality in the application. The *Sampson* court held that, since there was evidence of neither mistake nor fraud, the PTO was legally bound to issue plaintiff's patent. Defendant's argument on this score, therefore, is double-edged: not only is *Sampson* totally void of persuasive authority here, but *Harley* is controlling. [FN9]

FN8. When *Sampson* was decided in 1978, the PTO's regulations did not expressly allow withdrawal on the basis of unpatentability after payment of the issue fee. The regulation was amended in 1982 specifically to allow withdrawal from issue on the basis of "unpatentability of one or more claims." *See* 37 C.F.R. § 1.313(b)(3).

FN9. At the May 22, 2000 hearing, plaintiff argued that there actually is no functional difference between the *Sampson* court's consideration of the pre-subsection (3) regulation and the *Harley* court's consideration of the post-subsection (3) regulation. *See* May 22, 2000 Hr'g Tr. at 63. Plaintiff argued that, in *Harley*, the PTO indicated that they relied on the mistake exception to justify the withdrawal of the *Harley* plaintiff's patent, and that the mistake was the unpatentability of plaintiff's claim. In other words, plaintiff argues defendant slid subsection (3) unpatentability under subsection (1) exception. Therefore, both courts were actually considering the same subsection--subsection (1)--and the fact that subsection (3) had been passed is of no consequence. *Id.* The Court disagrees. The *Harley* opinion clearly indicates that subsection (3), and not subsection (1), was at issue. See Harley, 981 F.Supp. at 9, 11.

The Court finds that *Harley*, and not *Sampson*, is the more persuasive authority. First, the *Sampson* opinion, in a crucial section, includes language that effectively approvingly presages the addition of subsection (3):

> It may be that fraud by the applicant, or even good cause for the failure by the Patent and Trademark Office to discover the prior art earlier would justify a courtfashioned exception to the statutory command. For example, Patent and Trademark Office custom might have established and Congress might have accepted such an exception. But the Patent and Trademark Office has failed to offer any persuasive proof of such a custom or its acceptance by Congress. Moreover, there is a substantial difference between fraud or other questionable action by an applicant which might justify such an exception and the receipt of prior

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be withdrawn only upon a finding of unpatentability, not upon a possibility of unpatentability. But, plaintiff points out, the March 22 decision indicates that the February 17 notice was issued at the PTO Director's request because she believed that Blacklight's applications "raise[d] a substantial question of patentability on one or more claims." March 22 Decision at 2. Therefore, by defendant's *54 own admission, the PTO has not made a final determination on unpatentability, and so acts in violation of its own regulations, and the APA.

Defendant responds that plaintiff makes this argument about PTO regulations without citing any authority. On the other hand, defendant's own Manual of Patent Examining Procedure (MPEP) § 1308.1 makes clear that withdrawal on the basis of unpatentability after payment of the issue fee is a 2-step process: first, "the actual withdrawal will be handled by the Office of Patent Publications and then the application will be returned to the examiner" and the unpatentable claims are rejected. Defendant further points out that this interpretation of the PTO regulation was upheld in *Harley*, in which the applicant's claims were not formally rejected until 6 months after his application had been withdrawn from issue. *Harley*, 981 F.Supp. at 12.

The Court is persuaded by the defendant's argument. The unpatentability subsection functions as a last-chance procedural measure to enable defendant to observe the PTO's central mandate of issuing viable patents. It is not a final pronouncement of unpatentability. The March 22, 2000 Decision informed plaintiff of this posture; it stated that the Director's decision to withdraw the patent from issue did not constitute either a rejection or an adverse action on the ultimate determination of unpatentability. *See* Pl.'s Mot. for Summ. J., Ex. 8 at 4. Plaintiff has remedies outside this suit and this Court. *See* May 22, 2000 Hr'g Tr. at 55-59. Those remedies undermine plaintiff's suggested interpretation of the statute. Any subsection (3) determination of unpatentability will necessarily represent only a possibility of unpatentability, since such a determination, as defendant has made abundantly clear, is not in any way a final rejection. The PTO's withdrawal of plaintiff's patent application in order to reconsider its patentability was neither arbitrary nor capricious. [FN10]

FN10. This Court is troubled by several steps in the PTO's process, however. Defendant claims that the technology of the '294 application contravenes fundamental laws of chemistry and physics, yet the application was approved by a patent examiner, never reviewed by a supervisor, and would have issued as a patent but for the PTO's eleventh hour withdrawal. Defendant conceded at the May 22, 2000 hearing that the '294 application was withdrawn just days before the issuance date without the benefit of any PTO employee's re-evaluating the file. Also, the February 17 Notice, released twelve days before the scheduled issue date, gave no reason for the withdrawal besides a cryptic citation to 37 C.F.R. § 1.313(b)(3). At the May 22, 2000 hearing, defendant represented that these are common occurrences, because of the enormous number of patent applications that need to be addressed each year, and the "tremendous pressure" placed on patent examiners to produce work. *See* May 22, 2000 Hr'g Tr., at 48. Defendant may be well-advised to examine its patent issuance process so that their normal operations are not compromised by such seemingly suspicious procedures.

V. Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant's motion for summary judgment [13-1] is **GRANTED**; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment [11-1] is **DENIED**; and it is

FURTHER ORDERED that the Clerk shall enter final judgment in favor of defendant and against plaintiff.

END OF DOCUMENT

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Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER OF
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MAILED: FEB 12 2001

Paper No.:

In re Application of :
Randall L. Mills :
Serial No.'s: 09/009,837; 09/008,947; : COMMUNICATION
09/009,294; 09/110,678; 09/111,003; :
09/501,622; 09/110,694; 09/110,717; :
09/225,687; and 09/362,693 :

This communication is in response to your letter addressed to Ms. Esther Kepplinger, dated January 19, 2001. In your letter, you state that a personal interview on the above-identified applications has been scheduled for February 21, 2001, 10:00 a.m.

Examination procedures with respect to interview practice are set forth in MPEP 713.01. The purpose of an interview on the merits is to advance the prosecution of applications through clarification, discussion and possibly resolution of the legal and technical issues raised in an Office Action. Consequently, I have arranged for the Primary Examiners and Supervisors who were directly involved in the creation of the Office actions in the pending applications, to be present at the interview. These individuals are Wayne Langel, Vasu Jagannathan, and Steve Griffin.

Issues raised in your letter which are not germane to the advancement of prosecution on the pending applications are outside the scope of an interview, and will not be addressed during that time.

It is our hope that the interview on the merits will constitute a beneficial discussion of the legal and technical positions set forth by the examiners.

Sincerely,

JMStone

Jacqueline M. Stone, Director
Director, Technology Center 1700
Chemical and Materials Engineering